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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

NICHOLAS AND SHARON HONCHARIW,

Plaintiffs and Appellants,

v.

OLYMPIA FUNDING, INC.,

Defendant and Respondent.

A119527

(San Francisco County Super. Ct. No. CGC-05-441538)

Plaintiffs and appellants Nicholas and Sharon Honchariw filed suit against their mortgage broker, defendant and respondent Olympia Funding, Inc. (Olympia), for breach of fiduciary duty, fraud, constructive fraud and violation of the Consumers Legal Remedies Act (CLRA, Civ. Code, § 1750 et seq.). We affirm the trial court's judgment in favor of Olympia following a bench trial. Plaintiffs were not, as they now argue, entitled to judgment in their favor as a matter of law based on Olympia's retention of a lender-paid commission that was higher than that originally contemplated by the parties. Nor did the trial court abuse its discretion in denying plaintiffs' motion for new trial.

I. *BACKGROUND*

Plaintiffs own a home in Tiburon, California. In January 2004, they owed approximately $2.25 million on the property under three different loans, with monthly payments totaling more than $19,000. Plaintiffs were especially concerned about a third mortgage on the house for $1 million at 12 percent interest, for which payments were approximately $10,000 per month. They decided to refinance and began working with Oliver Ruehr, a loan agent at Olympia. As a loan broker, Olympia acted as an intermediary that could arrange for loans through a number of financial institutions.

Based on the information provided by plaintiffs,[1] Ruehr believed they would qualify for a Washington Mutual adjustable rate mortgage (ARM) with an introductory rate fixed for the first five years. Ruehr advised them that Olympia would receive a one point/one percent commission from Washington Mutual and would pay the closing costs on the loan out of that commission.

The commission to be paid to Olympia by Washington Mutual consisted of a yield spread premium, which is defined as " 'a bonus paid to a broker when it originates a loan at an interest rate higher than the minimum interest rate approved by the lender for a particular loan.' " (*Wolski v. Fremont Investment & Loan* (2005) 127 Cal.App.4th 347, 351; see also *Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1141.) Washington Mutual posted a daily rate sheet with different pricing options for its loans, from which a broker could select a particular interest rate margin and accompanying yield spread premium constituting the broker's commission. In general, a higher interest rate margin (i.e., a higher interest rate) would accompany a higher yield spread premium.

Olympia sent plaintiffs a proposed loan application, a good faith estimate and related documentation on January 21, 2004. Among other things, the good faith estimate reflected that Olympia's commission would be $25,000 (one percent of a $2.5 million loan). Plaintiffs reviewed the loan application and returned it. The application stated that their monthly income was $37,000, which was earned through plaintiff Nicholas Honchariw's investment banking company.

Washington Mutual did not approve plaintiffs' application for the five-year ARM because it could not verify their claimed income. Although Washington Mutual will in

[1] Though Ruehr communicated with plaintiff Nicholas Honchariw exclusively, we generally refer to plaintiffs in the collective.

some cases make a "low doc" loan, which requires no documentation of a borrower's income, plaintiffs did not have sufficient cash reserves or high enough credit scores to qualify for such a loan. Washington Mutual requested that plaintiffs submit their federal income tax returns from 2002, but plaintiffs refused to do so. Washington Mutual could not approve the ARM without tax returns reflecting the income claimed by plaintiffs.

A Washington Mutual representative advised Ruehr that plaintiffs' liquid assets were too low to qualify for the ARM and suggested that plaintiffs apply instead for a different type of loan known as an option ARM. This loan was less advantageous because the monthly payment would not be fixed for the first five years, but it could be approved without income verification. The Washington Mutual representative was concerned, however, that plaintiffs did not have sufficient verifiable liquid cash reserves to qualify for even the option ARM. Ruehr decided that the solution was for Olympia to take a two percent commission from Washington Mutual and then give plaintiffs additional monetary credits from that amount at the time of closing to increase their cash reserves. The loan could not have closed without the additional credits.

Plaintiffs decided to proceed with the option ARM. According to Ruehr, he discussed the two percent commission to plaintiff Nicholas Honchariw during a telephone call on March 18, 2004, and then mailed plaintiffs a written good faith estimate on that same day that reflected a commission of two percent of the loan amount. Plaintiffs claimed they did not receive the written good faith estimate, were not advised of the two percent commission and were told the fees would be the same as before.

The option ARM was approved and a notary came to plaintiffs' home on March 22, 2004 so they could sign the necessary loan documents. Before signing, plaintiffs noticed that a two percent commission was reflected on the loan documents. After the signing, plaintiffs had a three-day period within which to rescind the loan at no cost to them. Plaintiffs were aware of this rescission period.

On the morning after signing the loan documents, plaintiff Nicholas Honchariw contacted Ruehr to request additional credits and complain about the two percent commission. As a result of the negotiations, Olympia agreed to give plaintiffs additional credits. In addition to covering the closing costs on the loan out of their commission, Olympia gave plaintiffs approximately $7000 in credits. Plaintiffs requested a part of Olympia's commission, but Ruehr advised them he could not honor the request because Washington Mutual's internal rules prohibit brokers from sharing commissions with their principals. This rule is designed to discourage borrowers without adequate funds from continually refinancing and essentially making a living from sharing the broker's commissions.

Despite Olympia's refusal to share the additional commission, plaintiffs decided not to rescind the loan. Their monthly payments under the new loan were reduced by more than $11,000 from what they had previously paid each month. They refinanced again with Washington Mutual in January 2005.

Plaintiffs filed a complaint against Olympia, alleging causes of action for breach of fiduciary duty, fraud, constructive fraud and violation of CLRA. These claims were based on the allegation that Olympia had chosen an option ARM with a two percent commission without disclosing that higher commission and had misrepresented to plaintiffs that Washington Mutual had set the commission. The case was tried before the court, which granted Olympia's motion for judgment under Code of Civil Procedure section 631.8 on plaintiff Sharon Honchariw's CLRA cause of action, based on her failure to give timely notice of the claim. The court entered judgment on the merits in favor of Olympia on all remaining causes of action and denied its motion for new trial. In its final statement of decision, the court explained that plaintiffs had not proven various elements essential to each cause of action.

II. *DISCUSSION*

A. *Evidence Supporting the Verdict*

Plaintiffs argue that the trial court's judgment must be reversed because they were entitled to judgment in their favor on each cause of action. Because they are the parties with the burden of proof, the question on appeal is not whether substantial evidence would support a judgment in their favor, but whether the evidence *compels* a finding in their favor as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 570-571 (*Roesch*); *Caron v. Andrew* (1955) 133 Cal.App.2d 402, 409.) A defense judgment resting on a failure of proof must be upheld unless the plaintiffs' evidence was "uncontradicted and unimpeached" and "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding." (*Roesch*, *supra*, at p. 571.)

In this case, the the trial court reasonably determined that plaintiffs failed to prove damages, an element essential to each of plaintiffs' causes of action. The evidence was undisputed that Washington Mutual paid Olympia's commission; thus, the difference between the two percent paid as Olympia's commission and the one percent originally contemplated did not come out of plaintiffs' pockets directly. Although Ruehr testified that in general, a higher yield spread premium commission to the broker will result in a higher interest rate charged to the borrowers, plaintiffs presented no evidence to demonstrate that in this case they actually paid more interest than they would have under any loan available to them with a one percent commission. Ruehr testified that without the money from the two percent commission, Olympia would have been unable to give plaintiffs sufficient credits to increase their liquid assets and qualify them for the option ARM. The court could reasonably conclude that plaintiffs were not damaged by the payment of a two percent rather than a one percent commission when the loan with the one percent commission was not available to them.

Because the evidence supported the trial court's determination that plaintiffs failed to prove the element of damages, it is unnecessary to consider their arguments concerning other aspects of their claims. We note, however, that plaintiffs were admittedly aware of the two percent commission before they signed the loan documents and that they could have rescinded the loan at no cost to themselves during the three days after signing. Even if conflicting evidence was presented as to *when* they first learned of the two percent commission, the trial court could reasonably conclude that any concealment or misrepresentation by Olympia about the higher commission was not a cause of plaintiffs' alleged damages and was not relied upon by them in entering the contract for the loan.

B. *Motion for New Trial*

Plaintiffs alternatively argue that the trial court erred when it denied their motion for new trial based on an irregularity in the proceedings and newly discovered evidence. (Code Civ. Proc., § 657, subds. (1) & (4).) We review the trial court's ruling for abuse of discretion, but independently review the record to determine whether any error was prejudicial; i.e., whether a miscarriage of justice occurred (See *Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1160-1161; *Price v. Giles* (1987) 196 Cal.App.3d 1469, 1472.)

The alleged irregularity and newly discovered evidence both concern Ruehr's testimony about the good faith estimate for the option ARM dated March 18, 2004. Plaintiffs denied seeing that estimate before they signed their loan documents on March 22, although Ruehr maintained at trial that it was generated and mailed to plaintiffs on March 18. The estimate showed credits totaling $6,481.60, the amount ultimately credited to plaintiffs. However, estimated closing statements generated by the title company on March 22 and 23 showed credits of only $5,835.50 and $6,385.50, respectively. Ruehr testified that he had provided the correct amount of credits ($6,481.60) to the title company, but that it had not accurately reproduced them in its March 22 and 23 statements. Plaintiffs argued that the final figure of $6,481.60 could not have been known to Ruehr until adjustments were made during the negotiations between himself and Nicholas Honchariw for additional credits, suggesting the March 18 statement was actually produced after that date and was not sent to plaintiffs before the document signing at their home on March 22.

After the trial was over, plaintiffs reviewed the title company's files and discovered a draft of the March 22 estimated closing statement that omitted an entry for credits, but contained a handwritten notation stating that credits of $5,835.50 were due. Plaintiffs moved for new trial, arguing that the handwriting was Ruehr's and that he had faxed the copy back to the title company, thus showing he did not have the final figure of $6,481.60 until after March 18. Olympia argued that the evidence should have been discovered with reasonable diligence before trial, that plaintiffs had failed to establish that the notation was written by Ruehr, and that the evidence was not material given that other undisputed evidence showed that plaintiffs knew of the two percent commission by the time they signed the loan documents. The trial court denied the motion.

Plaintiffs have not demonstrated that the trial court erred. The evidence submitted in support of the motion for new trial was not new and could have been discovered by plaintiffs with reasonable diligence. The authenticity of the March 18 statement was litigated at trial and Ruehr was thoroughly cross-examined on the subject. Moreover, the moving papers in the trial court did not establish the source of the handwritten notation on the March 22 statement. Absent a showing that the notation was made by Ruehr or at the very least, made by another person in response to information directly provided by Ruehr, it did not tend to prove that he was more or less likely to be telling the truth when he claimed to have included the $6,481.50 figure in the good faith estimate dated March 18. Finally, the "new" evidence would not have affected the result of the trial when the trial court's judgment was based in large part on plaintiffs' awareness of the two percent commission before they signed the loan documents, on their failure to rescind the loan during three-day rescission period, and on their failure to prove damages.

C. *Exclusion of Evidence of Prepayment Penalty*

Plaintiffs argue that they were precluded from presenting evidence of prepayment penalties they incurred to refinance the option ARM in 2005. We disagree that reversal is required.

In March 2005, about a year after the closing date of the option ARM brokered by Olympia, plaintiffs refinanced and obtained a new loan for $2.5 million directly from Washington Mutual. They were charged a prepayment penalty of approximately $44,874.14 to terminate the option ARM, along with closing costs on the new loan. Olympia filed a motion in limine seeking to exclude the prepayment penalty and closing costs as damages, on the theory that these costs were not proximately caused by any fraud or breach of duty on the part of Olympia. Plaintiffs filed opposition stating that the prepayment penalty would not have been included in the option ARM, or would not have been as high, if Olympia had taken a one percent commission rather than a two percent commission. The trial court granted Olympia's motion and excluded evidence of the prepayment penalty.

Assuming a prepayment penalty may in some cases be a proper component of damages where a mortgage broker's fraud or misrepresentation has induced a borrower to accept a particular loan and that loan is later refinanced, any error in excluding evidence of the 2005 penalty paid by plaintiffs was harmless. Plaintiffs argue that they would have incurred no prepayment penalty during the 2005 refinance if they had obtained an option ARM in 2004 with a one percent commission rather than a two percent commission. But they presented no evidence at trial showing they could have qualified for any available loan carrying a one percent commission. The trial court accordingly found that plaintiffs were not damaged by their acceptance of the loan with the two percent commission.[2] Absent some evidence that plaintiffs could have qualified for a loan carrying a lower commission and, consequently, a lower prepayment penalty, the amount of that prepayment penalty is irrelevant and its exclusion could not have affected the verdict in this case.

Moreover, the trial court specifically found that Olympia did not fail to act as a reasonably careful mortgage broker, did not breach its duty of undivided loyalty, did not intend to deceive plaintiffs, did not fail to disclose material information to plaintiffs, and did not mislead plaintiffs or misrepresent the characteristics of the option ARM. Under the circumstances, plaintiffs cannot demonstrate that it is reasonably probable they would have obtained a more favorable result at trial if the court had heard information

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[2] Plaintiffs could have rejected the option ARM when it was offered to them in 2004, in which case they would have continued to make the higher payments on the original loans and, during the course of the ensuing year, would have been out of pocket more than the amount of the prepayment penalty they incurred in 2005.

concerning the 2005 prepayment penalty as a component of damages. (Cal. Const., art. VI, § 13; *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 332.)

III. *DISPOSITION*

The judgment is affirmed. Costs on appeal are awarded to respondent Olympia.

NEEDHAM, J.

We concur.

JONES, P. J.

SIMONS, J.